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No. 84-1743

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL A. BELLETIRE, et al.,

Petitioners,

vs.

RICHARD PARKS, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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June 5, 1985

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QUESTIONS PRESENTED*/

1. Whether the decision of the Seventh Circuit Court of Appeals that it is a violation of the Education for the Handicapped Act to charge responsible relative liability and not pay the full cost of residential schooling for developmentally disabled children placed in residential settings pursuant to Individualized Education Programs, conflicts with decisions of other Circuit Courts of Appeal.

2. Whether the Seventh Circuit's decision that it is a violation of the Education for the Handicapped Act to charge respon-

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*/Respondents submit that these questions, rather than those phrased by the Petitioners, state more precisely the issues presented by the instant case and do so in a less argumentative and repetitious fashion. At the same time, these questions fully embrace the issues presented for this court's consideration in the Petition for Certiorari.

sible relative liability and not pay the full cost of residential schooling for developmentally disabled children placed in residential settings pursuant to Individualized Education Programs, conflicts Board of Education v Rowley, 458 U.S. 176 (1982).

PARTIES

The list of parties in the Petition for Certiorari omits two parties, who, because they have not joined in any petition for certiorari, should be listed as Respondents under Supreme Court Rule 19(6). These are Patricia Barger, representative of the Illinois Department of Mental Health to the Illinois Governor's Purchased Care Review Board, and Manford Byrd, Superintendent of the Chicago Public Schools (substituted for Ruth Love pursuant to Supreme Court Rule 40).

It should also be noted that the Respondents Richard Parks, Marilyn Parks, and Lester Parks, by his parents and next friends Richard Parks and Marilyn Parks, represent both themselves and a class of all persons similarly situated. This Brief in Opposition is submitted on behalf of all Respondents other than Barger and Byrd.

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OPINIONS BELOW

The Petition for a Writ of Certiorari does not mention the opinion of the district court on the motion for a preliminary injunction, despite the fact that the opinion on summary judgment and class certification incorporates portions of it by reference. The opinion is published at 536 F.Supp. 296 (N.D. Ill. 1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

In addition to the provisions set out in the Petition for a Writ of Certiorari, the following provisions are involved in this case:

20 U.S.C. § 1412

20 U.S.C. § 1415(e)

34 C.F.R. § 300.2

34 C.F.R. § 300.401

These are set forth in the Supplemental Appendix at SP-1.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete and, in some respects, inaccurate.

The State Court Litigation

Lester Parks is an autistic child, who was 15 years of age when the state court litigation Parks v. Illinois Department of Mental Health and Developmental Disabilities was begun. His level of mental development was, in some aspects, similar to that of an 18 month old. The Chicago Board of Education ("Chicago Board"), which had the responsibility for his public education, excluded him from the public schools when he was five. His mother searched for alternative educational settings for him, ultimately applying to the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), on the Chicago Board's advice. The DMHDD placed Lester at New Hope Living

and Learning Center, in Waterloo, Illinois, with the Chicago Board's approval.

Because DMHDD had effectuated the placement, it left a responsible relative liability portion of the bill unpaid, $100 per month, pursuant to Ill. Rev. Stat., ch. 91 1/2, § 5-105.[1/] Had Chicago Board effectuated the placement without DMHDD's help, there would have been no charge. The Parks family exhausted DMHDD administrative procedures and ultimately initiated state court litigation to challenge the charge as a violation of the state's duty under the Education for the Handicapped Act, 20 U.S.C. §§ 1400, et seq. ("EHA"), to provide Lester a free, appropriate education. DMHDD admitted that Lester's placement was necessary for him to make educational progress,

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[1/] This was the maximum assessment. It applied to a family with an income of $15,600 a year. Parks v. Pavkovic, 753 F.2d 1397, 1400 (7th Cir. 1985).

but contended that since DMHDD did not receive EHA funds, it was not bound by the Act. The trial court found that DMHDD was bound by the Act pursuant to 34 C.F.R. § 300.2(b)(3), and barred DMHDD from assessing the responsible relative liability charge. This order was entered September 2, 1981.

DMHDD appealed, repeating its contentions. The Appellate Court affirmed on October 18, 1982. Parks v. Illinois Department of Mental Health And Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982). DMHDD filed a petition for leave to appeal to the Illinois Supreme Court, which the Supreme Court rejected on February 1, 1983. No petition for certiorari was filed with this Court.

The Federal Court Litigation

While the state court litigation was pending, New Hope notified the parents

of children there that it was about to close. The Parks family requested that DMHDD and the Chicago Board of Education move Lester to a different placement. They did so, placing him in Willowglen Academy in Milwaukee. But because the state court action was an administrative review only of Lester's charges at New Hope, DMHDD refused to apply the court's decision to the new placement. The Parks family attempted to exhaust its remedies under the EHA to compel full payment for the placement, and a state hearing officer ordered the Chicago Board of Education to make full payment in the future, holding, however, that there was no administrative authority to authorize payment of back charges. The Chicago Board ignored the order. Appeals were filed to the Illinois State Board of Education, which failed to render any decision. The 30 days provided by federal

regulation for a decision passed. 34 C.F.R. § 300.512(b). Meanwhile, Willowglen issued a discharge notice.

The Parks family then filed the instant case in federal district court, asking for a preliminary injunction to pay the entirety of Lester's bill at Willowglen to keep him in school, and a classwide, permanent injunction to prevent the charging of responsible relative liability for similar children.[2/] A preliminary injunction was issued on March 19, 1982. Class certification and summary judgment were granted on February 28, 1983, and a class injunction was entered on June 22, 1983. The injunction was issued as a partial, final order under Fed. R. Civ. P. 54(b), because

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[2/] The Petition for Certiorari omits the statement of the basis for federal jurisdiction in the district court required by Supreme Court Rule 21 (1)(h). The basis is 28 U.S.C. §§ 1331(a) and 1343(c)(3), and 20 U.S.C. § 1415(e)(2).

other costs charged to parents (certain nursing and school health costs) are still the subject of litigation in the district court.

In the district court, the defendants broke into two groups, each blaming the other for a system where identical children would be given a free education or denied one on the basis of which state agency signed the placement papers. No distinction was raised between the children with responsible relative liability charges and those without, except for the agency doing the placement. Different defenses of the system emerged. Those defendants associated with the Illinois State Board of Education had no defense of responsible relative liability charges, but argued that no monetary remedy existed under the EHA, and that any there was would be barred by the eleventh amendment to the United States Constitution. Both

these arguments have been waived in the Petition for Certiorari. The defendants associated with the Illinois Department of Mental Health and Developmental Disabilities did defend the charges, saying that if the EHA required free residential placement, it was unconsitutional, because it eliminated the financial disincentive to residential placement that the responsible relative liability charges represented, and so led to restrictions of handicapped children's liberty. This argument was rejected by the district court as frivolous, and it was raised in neither the Seventh Circuit appeal nor the Petition for Certiorari.

The court certified the class and enjoined the defendants from leaving DMHDD responsible relative liability unpaid for handicapped children in private special education placements. "Special education placements" were distinguished

from other placements not covered by the injunction. The only placement covered by the injunction was to be a placement pursuant to an Individualized Education Program which provides for the placement. The court also required the defendants to pay the back liability charges or reimburse parents for them from September 1, 1978 forward.

The defendants appealed to the Seventh Circuit, arguing for the first time that the children whose placements carried responsible relative liability were a special category, those placed for reasons of "developmental disability." The defendants never denied that these placements were needed for these children to learn, and the definition of "developmental disability" they advanced led the court to conclude that this category of children had been placed for what, under the EHA, is an educational reason: these severely

developmentally delayed children needed residential placement to acquire basic life skills to live independently. The defendants repeated their arguments about remedies that they have now dropped. They also contended that the case was moot because Lester Parks's bill was paid in full, even though his parents were still under a bond to repay the state if the injunction were reversed, and the defendants' notice of appeal specifically included the preliminary injunction. This argument has now been dropped.

The Seventh Circuit panel ruled unanimously that the charges were unlawful, and affirmed the injunction, but modified the monetary relief ordered by the district court. It reversed the decision that the defendants had to reimburse parents for the amounts that they had wrongfully been required to pay to their children's

private schools. Its reasoning was that the EHA did not permit such an award of "damages." The portion of the remedial order that required public payment of parents' unpaid bills was affirmed, however, on the ground that it was not damages, but relief ancillary to the prospective injunction. No petition for rehearing was filed, and the mandate of the Seventh Circuit issued.

Contrary to the Petitioners' Statement of the Case, the notice adverted to at 11-12 was sent to the members of the class. It advised them to submit proof of indebtedness to the state for payment. No motion to say or recall the mandate has been filed, and final relief is now being implemented.

In the meantime, Lester Parks has made tremendous strides, and now has most of the skills and abilities of a child of six. He has completed Willowglen's

program. He lives in a group home for autistic adults, and contributes to his own support by working in a sheltered workshop.

SUMMARY OF ARGUMENT

1. Petitioners are trying to create a conflict between the Seventh Circuit Court of Appeals decision and the Third Circuit's decision in Kruelle v. New Castle County School District. These decisions are not in conflict. The Seventh Circuit relied on Kruelle in holding, consistently with all other federal courts that have considered the issue, that the state educational agency could not avoid its liability for funding the placement by arguing that the child has other, non-educational needs which might otherwise require residential placement. Under the facts of this case, where the Petitioners have conceded that the class members were residentially placed for reasons of developmental disability, Petitioners' attempted distinction between "educational" and "non-educational" reasons

for a residential placement is sheer sophistry. Furthermore, the Individualized Education Programs which were developed for each class member provide that a necessary component of the child's education is residential placement. Thus, under the EHA, these children are entitled to free residential schooling.

2. The decision of the Seventh Circuit is not inconsistent with Board of Education v. Rowley. The decisions of the courts below applied Rowley, and used standards consistent with that case in determining the nature and scope of relief.

3. Additional considerations counsel against review of this case. The Seventh Circuit's decision follows the decisions of the Illinois State courts. Petitioners' arguments constitute a challenge to the definition of the class, an issue on which the district court's decision is entitled to special deference.

ARGUMENT

I. THE SEVENTH CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE THIRD CIRCUIT OPINION IN KRUELLE v. NEW CASTLE COUNTY SCHOOL DISTRICT.

The Seventh Circuit Court of Appeals correctly decided that the Illinois Department of Mental Health and Developmental Disability practice of charging responsible relative liability violates the requirement of the Education for the Handicapped Act, 20 U.S.C. § 1400, et seq. ("EHA"), that a free appropriate public education be provided for handicapped children who are placed in private residential placements pursuant to an Individual Education Program ("IEP"). Petitioners contend that this decision is somehow in conflict with the Third Circuit Court of Appeals decision in Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), asserting that the Seventh Circuit provided relief to all

developmentally disabled children placed in residential placements pursuant to an IEP, without considering whether those placements were necessary for education or were "made for interdependent, non-segregable educational and non-educational reasons." Petition for Certiorari at 14. Petitioners also contend that the Seventh Circuit decision is incorrect because it did not examine whether each class member's placement was made for "educational" or "non-educational" reasons.

Petitioners seek to create conflicts among circuit courts where none exist in an attempt to secure this Court's review of the case. Further, Petitioners are confused about the Seventh Circuit's definition of those children who are class members and who are therefore entitled to relief.

A. Petitioners Manufacture an Intercircuit Conflict in an Attempt to Obtain This Court's Review.

The Third Circuit in Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), held that the District Court was justified in holding that a residential placement was necessary for the plaintiff to be educated, and that the state educational agency could not avoid its liability for funding the placement by arguing that the child has other, non-educational needs which might independently require residential placement. Federal courts have consistently found that residential placements are covered by the EHA. See, e.g., Burlington School Committee v. Department of Education, 53 U.S.L.W. 4509, 4510 (U.S. 1985); Papacoda v. State of Connecticut, 528 F. Supp. 68, 71 (D. Conn. 1981). The Seventh Circuit's conclusion that Illinois is

liable for room and board is consistent with Kruelle and with other federal court decisions which have considered the matter of a state's responsibility for providing a free appropriate public education for residentially placed children.

The rationale of the Seventh Circuit on this issue is also consistent with Kruelle and the other federal courts. Both the Seventh Circuit in Parks and the Third Circuit in Kruelle recognized the educational need for residential placements. The Kruelle court looked at the placement in the context of an individual case; the Parks court looked at the placements in the context of a class action by acknowledging that IEP's which provide for residential placement of developmentally disabled children as part of an educational program constitute placements necessary for education.

Petitioners do not indicate any inconsistency between the language of Kruelle and of Parks because it is impossible to do so. Judge Posner relied on Kruelle in reaching his conclusion that Illinois is liable for those residential placements required by an IEP. Parks, 753 F.2d at 1405-06, Appendix to Petition for Writ of Certiorari ("Appendix") A-13. Judge Posner, in one of three illustrative examples, describes a child who "must be institutionalized for educational reasons but equally for medical reasons." Parks, 753 F.2d at 1405, Appendix A-12-13. This demonstrates the Kruelle unseverability standard. Kruelle, 642 F.2d at 693-94. See also North v. District of Columbia Board of Education, 471 F. Supp. 136, 141 (D.D.C. 1979) (free placement in residential program required where court found social, emotional, medical and educational problems so inter-

twined that it could not perform "the Solomon-like task of separating them"). Thus, the Seventh Circuit decision does not conflict with Kruelle, but instead reaffirms it.

Petitioners incorrectly suggest that Judge Posner's example of an uneducable, comatose child is equivalent to a Seventh Circuit holding that "Illinois... pay the room and board expense for all handicapped children in Illinois between the ages of three and twenty-one who are in private residential placements." Petition for Certiorari at 13 (emphasis in original)(footnote omitted). Judge Posner gave an example of a child whose placement would not be called for by his or her IEP and for whom, therefore, the state would not be required to pay room and board. Room and board in that instance would not be an educational expense. Judge Posner's one example

does not constitute the court's holding. It was merely a tool he used to focus in on the issue before the court. Parks, 753 F.2d at 1404-05, Appendix at A-11-13. That example does not illustrate the only case in which the state would not be liable for room and board expense, as Petitioners assume. This example and the rest of Judge Posner's rationale and conclusion are perfectly consistent with Kruelle. Therefore, the Seventh Circuit's opinion in Parks does not create an intercircuit conflict which this Court should consider resolving.

B. Petitioners' Distinction Among Class Members Is Meaningless Because Illinois Children Placed for Developmental Disability Reasons Pursuant to an IEP Are So Placed in Order to Be Educated.

Petitioners do not deny that all residential placements made solely by traditional education agencies should be free of charge to parents. Petitioners also seem to say that at least some DMHDD placements should be free. But they argue that others -- those not necessary for education -- should not be free.

Petitioners, however, conceded before the Seventh Circuit that all class members are placed by the DMHDD for developmental disability reasons. Parks, 753 F.2d at 1400-01, and 1405-06, Appendix at A-2-4 and A-13-14. The Seventh Circuit correctly pointed out that children who are "developmentally disabled" under Illinois law are also "handicapped children" whose handicaps entitle them to

special education under the EHA. Compare Ill. Rev. Stat., ch. 91 1/2, § 1-106 (1984 supp.) and 20 U.S.C. § 1401(a)(1) (1984 supp.). "Developmental disability, far from being an exempted category, is an important subcategory of the handicaps covered by the [EHA]." Parks, 753 F.2d at 1406, Appendix at A-13.

Thus, an Illinois child who is placed in a residential program because he is developmentally disabled is so placed because of his need to be educated just as much as the child who is otherwise classified as handicapped. Petitioners' attempted distinction is based on a mere semantic difference: whether an Illinois child is classified as "developmentally disabled" or "handicapped" changes the label without changing the nature of the need for residential placement. As Judge Posner pointed out, the essential meaning of the term "developmentally

disabled" under state law is "mentally retarded;" the whole purpose for residential placement of such a child is education. Id.

Petitioners cannot defend their position by saying that there are "non-educational reasons" for the placement of some developmentally disabled children. The "reasons" for residential placements are not the proper inquiry under the Act. The proper inquiry is whether residential placement is necessary for the child to learn, 34 C.F.R. § 300.302, or by extension, whether the placement serves educational purposes. Comment, 34 C.F.R. § 300.302. Indeed, federal courts around the country are unanimous in determining that a state cannot avoid its obligations under the EHA by showing that a child would have to be institutionalized apart from the educational needs

which required institutionalization.[1/] See Parks, 753 F.2d at 1406, Appendix at A-13: Kruelle, 642 F.2d 687; Gladys J. v. Pearland Independent School District, 520 F. Supp. 869 (S.D. Tex. 1981). See also Stark, Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. 94-142,

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[1/] Petitioners agree that the IEP does not state the "reasons" for a residential placement. Petition for Certiorari at 7, n. 1. Petitioners then argue that some residential placements are made for non-educational reasons, citing State Board of Education Rule 8.03, which states that representatives of other state agencies are to be invited to the multidisciplinary conference which develops the IEP when a residential placement is contemplated for reasons primarily other than education. However, the fact that representatives of other agencies may attend the multi-disciplinary conference does not mean that the IEP which is developed is "non-educational". By definition of the IEP that cannot be true. See infra at 29. Further, State Board of Education Rule 8.03 does not absolve the state of its responsibility under federal law to provide free of charge those residential placements developed pursuant to an IEP.

14 Conn. L. Rev. 477, 514 (1982) ("Federal courts have uniformly rejected education agency attempts to distinguish emotional, or therapeutic, or parenting, or medical needs from educational needs and thereby avoid fiscal responsibility for necessary residential programs." [emphasis added]).[2/]

[2/] Petitioners refer this Court for guidance to Professor Stark's explanation of what should be considered an "educational" placement. But as Professor Stark makes clear in his article, Petitioners' position is contrary to (1) the overwhelming majority of federal courts that have considered the issue, (2) the plain language of the EHA and its regulations and (3) the key EHA objectives of reparation for the severely disabled and nondiscriminatory treatment among different disability groups. Stark, 14 Conn. L. Rev. at 514-518. The other article to which Petitioners refer this Court suggests the analysis adopted by Petitioners in their Petition for Certiorari. Mooney & Aronson, Solomon Revisited: Separating Educational and Other than Educational Needs in Special Education Residential Placements, 14 Conn. L. Rev. 531 (1982). See Petition for Certiorari at 14, n. 4. However, this suggested analysis is only a proposal by the authors rather than a statement of current law. In fact, the authors acknowledge that the Kruelle decision is at odds with their proposed analysis. The current standard is that stated by Judge Posner in Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985), and is not in conflict with decisions on the same issue in any other Circuit.

The District Court for the Northern District of Illinois, the Seventh Circuit Court of Appeals, and all Illinois state courts that have heard the issue have unanimously found that the State of Illinois is liable for room and board charges for Lester Parks and other class members. Indeed, Petitioners conceded in the Seventh Circuit that assessing the charge for Lester Parks violated the EHA. 753 F.2d 1397, 1403-1404, Appendix at A-8-9. Yet they present no basis to challenge the finding of the district court, made on the basis of uncontested affidvits, that Lester's case is fully typical of that of other class members. See Fed. R. Civ. P. 52(a). There is no intercircuit conflict here. Petitioners misconstrue both Parks and Kruelle in an attempt to create a conflict between the two opinions.

C. Only Those Children Whose Residential Placements Are Required by an IEP Are Entitled to Relief Under the Seventh Circuit's Decision.

The Seventh Circuit correctly affirmed the district court's grant of relief, which is limited to those children who receive special education or related services pursuant to an IEP which requires the residential placement. The IEP determines when a residential placement is necessary for education.

An IEP is a statement by the school district or other public agency that this program is what the child must have in order to learn. An IEP must be developed before a child can begin an educational placement, whether the placement recommended is public or private. 34 C.F.R. § 300.342; 34 C.F.R. § 300.347. The IEP determines what program components are necessary to provide a child with

a free appropriate public education. 20 U.S.C. § 1401(18); 20 U.S.C. § 1401(19); 34 C.F.R. § 300.346. See Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982). Residential placement, with room and board provided at no cost to parents, is one such educational program component which may be provided for in an IEP. 34 C.F.R. § 300.302. An IEP that requires a residential placement reflects a decision by the school district or the state agency that a residential placement is necessary for this child to be educated.

Petitioners seem to contend that more intense scrutiny of each developmentally disabled child's IEP is needed to indicate which children were "educationally" or "non-educationally" placed. They say that the "reasons" for a particular placement must be examined before relief can be granted to class members.

Respondents disagree. The reasons for individual class member's placements need not be examined under current federal law, see supra at 25, and, even if the reasons for each class member's placement should be examined, such reasons were fully and adequately examined as the IEP was developed. Thus a child residentially placed under an IEP is "educationally placed" even under Petitioners' approach.

The district court and the Seventh Circuit recognized that Petitioner's demand is futile. The members of the class whose IEP's call for a residential placement are the same developmentally disabled children whose placement in residential facilities is necessary for their education. As Petitioners appear to acknowledge, the IEP does not specify particular "reasons" for placement. Petition for Certiorari, at 7, n. 1. The existence of an IEP which calls

for residential placement means that that placement is necessary for the child's education. In all such cases, free residential schooling is required under 34 C.F.R. § 300.401, which provides:

> "Each state educational agency shall insure that a handicapped child who is placed in ... a private school or facility by a public agency:
>
> (a) Is provided special education and related services:
>
> (1) In conformance with an [IEP]...;
>
> (2) At no cost to the parents...."

II. THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH BOARD OF EDUCATION V. ROWLEY.

Petitioners' citation of Board of Education v. Rowley, 458 U.S. 176 (1982), adds little to their analysis. In Rowley, this Court held that the EHA, consistent with its roots in case law under the equal protection clause of the fourteenth amendment to the United States Constitution,

requires "meaningful access" to educational services for the handicapped, rather than any enhanced level of educational quality where useful services are being provided. Id. at 198. Thus a deaf girl who could progress easily from grade to grade in regular classes with a hearing aid and other supplementary benefits was not entitled, in addition, to the full time services of a sign language interpreter. Id. at 210.

There is no conflict between the decision in the instant case and that in Rowley, much less a conflict on an important issue within the meaning of Supreme Court. Rule 17(1)(c). Rowley acknowledges that the EHA requires residential placement of some children, id. at 181, n. 4, just as it recognizes that the local or state education agency's determinatio of just what the Act requires for each child is found in the services called

for on the Individualized Education Program, id. at 203-204. Rowley's focus on whether the services at issue are needed for the child to learn is completely consistent with that of the federal regulation that all of the courts in this case have relied on: whether "placement in a public or private residential program is necessary to provide special education and related services to a handicapped child . . ." (emphasis added). If so, "the program, including nonmedical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302.

By developing IEP's that call for residential placement for each child in the class, as well as by conceding that each child in the class has been residentially placed for reasons of developmental disability, the Petitioners have acknowledged that residential schooling is necessary to provide special educa-

tion and related services. With Lester Parks as with the other children placed by the same agency for the same reasons, "[t]he EHA will not countenance defendants' decision to accede to Lester's placement at Willowglen as long as they need not fully fund it." Parks v. Pavkovic, 557 F. Supp. 1280, 1285, Appendix at B-8. On the contrary, as Rowley states, the EHA requires that needed "instruction and services be provided at public expense." 458 U.S. at 189. As this Court's most recent case interpreting the EHA makes clear, "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." Burlington School Committee v. Department of Education, 53 U.S. L.W. 4509, 4513 (U.S. 1985).

III. THE OTHER CONSIDERATIONS OF SUPREME COURT RULE 17 COUNSEL AGAINST REVIEW.

Far from being a situation in which the Seventh Circuit Court of Appeals decision is contrary to a decision of a high state court, the Seventh Circuit opinion is perfectly consistent with decisions of the Illinois state courts in the same case. All state and federal courts which have considered the issue have held, without dissent, that the State of Illinois violated the EHA by charging responsible relative liability to children placed in residential placements pursuant to an IEP. See S.Ct. Rule 17(1)(a) and (b). Cf. Forsyth v. Hammond, 166 U.S. 506 (1897) (grant of certiorari where conflict existed between federal court and courts of state where federal court was located). The Illinois Supreme Court refused to review the Appellate Court's decision that Illinois acted

unlawfully in charging responsible relative liability for Lester Parks.[3/]

Furthermore, to the extent that Petitioners are challenging the district court's definition of the class (which was affirmed by the Seventh Circuit), this Court has expressed a justifiable reluctance to review class definitions, an area in which district courts have wide discretion. See Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979).

[3/]A federal administrative determination is also in accord. The United States Department of Education Office of Civil Rights has issued a letter finding that it violates regulations that incorporate the EHA regulations to fail to pay responsible relative liability for handicapped students in Chicago. Ruth B. Love, 3 E.H.L.R. (CRR) 257.448 (March 11, 1983)

IV. THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT THE STATE OF ILLINOIS ACTED UNLAWFULLY BY CHARGING RESPONSIBLE RELATIVE LIABILITY TO DEVELOPMENTALLY DISABLED CHILDREN RESIDENTIALLY PLACED PURSUANT TO AN IEP.

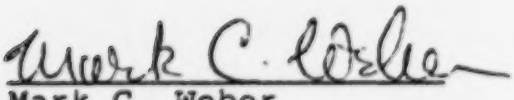
The EHA requires that a free appropriate public education be provided to all handicapped children. The State of Illinois was not providing a free appropriate public education when it required parents whose children were classed as "developmentally disabled" to pay up to $100 per month for the residential placement of their children, even though, as Petitioners all but concede, those placements were necessary for the children to learn. The class of children who receive relief under the lower courts' decisions are those whose placements were necessitated by their developmental disability, children who, because of mental retardation and similar afflictions, cannot satisfactorily

be educated at home. Parks, 753 F.2d at 1406, Appendix at A-13. Moreover, the only children in the class are those whose residential placements are called for by their IEP's. The IEP's purpose is to state what the school district or other public agency acknowledges that the EHA requires for a particular child so that that child may be educated. Petitioners deny the importance of the IEP in an attempt to persuade this Court that they need not provide a free appropriate public education for a certain class of handicapped children. Petitioners' attempt is in direct contravention of the EHA, federal regulations and state and federal court decisions. Therefore, the decision of the Seventh Circuit is correct in all aspects challenged by Petitioners.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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20 U.S.C. § 1412

Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that --

. . .

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three

and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

. . .

20 U.S.C. § 1415

Procedural safeguards

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection

(c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

34 C.F.R. § 300.2

Applicability to State, local and private agencies.

(a) States. This part applies to each State which receives payments

under Part B of the Education of the Handicapped Act.

(b) Public agencies within the State. The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) Private schools and facilities. Each public agency in State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

34 C.F.R. §300.302

Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

34 C.F.R. § 300.401

Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school of facility which meets the standards that apply

to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.